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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Unit "B"

BRIEF AMICUS CURIAE OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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A petition for writ of certiorari was filed on May 27, 1983, by the Southern Motor Carriers Rate Conference, Inc. (SMCRC), the North Carolina Motor Carriers Association, Inc. (NCMCA) and the National Association of Regulatory Utility Commissioners (NARUC). The brief in opposition of respondent United States is due to be filed on or before July 31, 1983.

American Trucking Associations, Inc. (ATA) files this brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, Unit "B."

INTEREST OF THE *AMICUS CURIAE*

ATA is the national trade association of the trucking industry representing all types of motor carriers of property. It is a federation of individual motor carrier associations organized in each of the fifty States and the District of Columbia. In each case, the member motor carriers of these state associations are engaged in the transportation of property in intrastate as well as interstate commerce.

This brief is filed by ATA on behalf of itself, its affiliated State associations and their member motor common carriers, all of whom share a vital interest in the issues involved in this proceeding.

ARGUMENT

This Case is of Crucial Importance to the Continued Viability of Intrastate Motor Carrier Transportation Systems in Forty States

The essential issue here is whether the collective formulation of intrastate rate proposals by motor carriers in States where such activity is authorized but not compelled violates the federal antitrust laws. The Court of Appeals for the Fifth Circuit, Unit "B," has held that state compulsion for motor carrier collective ratemaking is an absolute prerequisite to application of the "state action" doctrine and therefore SMCRC and NCMCA, defendants below, violated the federal antitrust laws, whether or not the policies in the involved States are "sufficiently clearly articulated and affirmatively expressed for the state action exception to apply." [1]

[1] 702 F.2d 532 at 534, which petitioners have inserted into their petition for writ as Appendix D at 64a.

In presenting the reasons why the writ should be granted, petitioners have stressed the crucial importance of this case to effective state regulation of the intrastate rates of motor common carriers of property. Petitioners have explained how the regulatory schemes of Alabama, Georgia, Mississippi, North Carolina and Tennessee will be affected adversely by enforcement of the Fifth Circuit's holding, and why there will be an immediate and devastating impact on the similar regulatory schemes of the other thirty-five States as represented by petitioner NARUC if the lower court's decision is not overturned.

There is a corollary to petitioners' argument which ATA as *amicus* desires to point out. This case is crucially important to the continued viability of the intrastate motor carrier transportation systems themselves which have developed within the forty States involved.[2]

Intrastate motor carrier transportation in this country, like interstate transportation, is a coordinated system, comprising thousands of carriers joining together to assure service to all points in every State, large and small. Extensive operating relationships have been established which have proven to be advantageous to the provision of adequate, economical and efficient service to shippers.

The drafters of the federal antitrust exemption adopted in 1948 for rail and motor carrier collective ratemaking recognized the importance of this interdependence and interrelationship, as follows:

> The business of common carriers is distinguished from business generally in important and controlling respects. In the first place, it is subject to special and comprehensive regulatory laws; State and National, and to a continuing supervision by administrative agencies of the Government. In the second place, the nature of common carriers is such that there is an inevitable interdependence and interrelationship between the activities of individual carriers.

S. Rep. No. 44, 80th Cong., 1st Sess. 2 (1947).

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[2] Petitioners list the forty States in their brief at 8, n.18.

The development of the various intrastate systems has paralleled that of the federal interstate system. The former exist today as microcosms of the latter. As with the Federal system, the growth of these State systems has been nurtured by the ability of motor carriers to participate in the collective ratemaking process.

Primarily, the motor carriers particiating in the collective ratemaking process are "full service" common carriers of general freight, providing service on both truckload and less-than-truckload shipments. The operations of these carriers involve a pattern of service interconnections among all such carriers in a State, even those in direct competition with each other. The establishment of joint routings between competing carriers allows substantial economies, conserves fuel and achieves desirable load factors. If carriers are estopped from "interlining" freight,[3] service to outlying and smaller communities, in particular, would be either more expensive, less frequent, or both.

The Fifth Circuit's decision impacts adversely on the intrastate motor carrier transportation systems in other ways. The immunized collective process provides a basis for fairly apportioning transportation rates among commodities on the basis of the cost of transportation. The vast majority of carriers do not have the capability of or capacity for doing individually what is done collectively, namely, allocating their costs, e.g., fuel or labor cost, among various segments of their traffic. A typical intrastate motor common carrier deals annually with

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[3] "Interlining" is the transportation term for exchanging freight between motor common carriers at common points of service for delivery to destination. Carriers which are both interline partners and competitors on a particular route would be placed in jeopardy if the antitrust laws were applicable to their discussions of the joint rates. Interlining between such carriers would be unlikely to occur in the absence of antitrust immunization.

thousands of shipments of varying weights consisting of thousands of different commodities moving between hundreds of origins and destinations.[4] For most such carriers, the expense of individually meeting the burden of formulating and justifying cost-oriented rates would exceed their revenues from interstate traffic.[5]

Additionally, the imunized collective process has fostered the development of a common language, which has been essential to carriers and shippers alike. Carriers have been able to construct a simplified system of class rates, which enables shippers to discern whether or not they are being discriminated against.

Because the collective process provides a means of avoiding rate and service discrimination, it has also promoted uniform and stable structures of rates and thereby prevented unfair and destructive competitive practices. Rate stability has meant that rate levels do not fluctuate violently, which would be unhealthy for both shippers and carriers.

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[4] According to the latest statistics on intrastate motor carriers, there were 58,335 such establishments in 1977, generating $12.62 billion in revenues and employing 333,612 persons. U.S. Department of Commerce, Bureau of the Census, 1977 Census of Transportation, Nonregulated Motor Carriers and Public Warehousing 2 (1981). Based upon this information, the average intrastate motor carrier generated $216,000 in revenues and operated with less than 6 employees.

[5] Smaller carriers, in particular, would be confronted with a tremendous financial burden if they had individually to hire and maintain a staff of sufficient size and technical and professional expertise to perform the essential cost analysis and studies currently provided by the various rate bureaus through which collective intrastate rates are currently formulated.

CONCLUSION

For more than three decades now, virtually all of the States have had in effect a regulatory scheme which was patterned upon the federal one. Almost all of these State schemes remain in effect today.[6] The foundation of each has been a transportation policy whose stated goals have paralleled our national transportation policy: safe, adequate, economical, and efficient service, with reasonable rates and without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.[7] Thus, the fears expressed by the drafters of the federal antitrust immunity, concerning the adverse consequences to an interstate system operating in the absence of antitrust immunity, are also applicable to the Fifth Circuit's decision, as it adversely affects the continued viability of the various systems of intrastate motor common carriage:

> There can be no doubt that the public interest would be adversely affected if the antitrust laws were so applied to common carriers as to prevent or discourage such collaboration between such carriers as is essential to or in furtherance of the requirements of the Interstate Commerce Act and the purposes of the national transportation policy which is designed to promote sound economical conditions in transportation, and safe, adequate, and efficient service to the public under reasonable rates and without discrimination or unfair or destructive competitive practices.

S. Rep. No. 44, 80th Cong., 1st Ses. 4 (1947).

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily

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[6] *See* n.2, *supra*.

[7] Interstate Commerce Act, preceding §§ 1, 301, 901, and 1001, 54 Stat. 899 (1940) (current version at 49 U.S.C. § 10101 (1980)).

> meet their duties and responsibilities thereunder and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent. . .

H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 (1947).

The decision of the Fifth Circuit, Unit "B," will affect adversely the continued viability of intrastate systems of motor common carriage that have developed in the vast majority of the States. This Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, Unit "B."

Respectfully submited,

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